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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court applying heightened scrutiny to restrictions on speech—here, regulations limiting the rates that cable operators may charge for programming—must defer to factual determinations and assumptions made by an administrative agency so long as they are not "arbitrary and capricious."

PARTIES, INTERVENORS, AND AMICI TO THE PROCEEDINGS

Petitioner is National Cable Television Association, Inc. A separate petition for writ of certiorari is being filed by the Time Warner Entertainment Company, L.P. Other parties, intervenors, and amici in the proceedings below were:

Cable Telecommuncations Association
Comcast Cable Communications, Inc.
Wometco Cable Corp.
Harron Communications Corp.
Horizon Cable I, L.P.
C-TEC Cable Systems Inc.
Armstrong Holdings, Inc.
Cox Cable Communications, Inc.
Newhouse Broadcasting Corp.
Cablevision Industries Corp.
Benchmark Communications
Continental Cablevision, Inc.
Century Communications Corp.
Blade Communications, Inc.
Columbia Associates, L.P.
Daniels Cablevision, Inc.
Greater Media, Inc.
McDonald Investment Company, Inc.
Prime Cable Corp.
TeleCable Corporation
United Video Cablevision, Inc.
Western Communications
Falcon Holding Group, L.P.
Coalition of Small System Operators
Douglas Communications Corp. II
City of Austin, Texas
Attorney General of the State of Connecticut
Consumer Federation of America
Bell Atlantic
GTE Service Corp.
BellSouth Telecommunications, Inc.
NYNEX Corporation
DirecTV, Inc.

Liberty Cable Co., Inc.
National Association of Telecommunications Officers and Advisors
Federal Communications Commission
United States of America

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PETITION FOR A WRIT OF CERTIORARI

This case involves a First Amendment challenge to the regime of rate regulation imposed by the federal government on virtually all cable television systems in the United States. The Federal Communications Commission, presuming that any cable system without a direct cable competitor was charging supracompetitive prices, ordered all such systems to reduce their rates by 17 percent. Despite the potential effects of such reductions on the quantity and quality of speech, the court of appeals upheld the order, applying standards of review applicable to administrative orders generally rather than heightened standards applicable to orders implicating speech. In particular, the court emphasized that its review of agency ratemaking should be "particularly deferential" and that its role was

simply to determine whether the orders were "arbitrary and capricious." [1]

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a) are reported at 56 F.3d 151. The relevant orders of the Federal Communications Commission are reported at 8 FCC Rcd 5631, 9 FCC Rcd 1164, 8 FCC Rcd 8444, 9 FCC Rcd 4119, and 9 FCC Rcd 4529.[2]

JURISDICTION

The court of appeals entered judgment on June 6, 1995. Pet. App. 1a. A timely petition for rehearing was denied on August 17, 1995. Pet. App. 100a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Relevant provisions of the Cable Television Consumer Protection and Competition Act of 1992 are reprinted at Pet. App. 104a.

STATEMENT

I. Background.

A. The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 ("1984 Act") was the first comprehensive attempt by the federal government to regulate cable television systems. Prior to the Act, "there was no Federal policy for cable television." *See* S. Rep. 92, 102d Cong., 1st Sess. 2 (1991) (*Senate Report*).

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[1] Pursuant to Rule 29.6 of the Rules of this Court, petitioner National Cable Television Association, Inc. states that it has no parent company and no subsidiaries.

[2] "Pet. App." refers to the appendix to the petition filed by Time Warner Entertainment Co. seeking review of the same judgment we challenge here. The voluminous orders of the Commission have been lodged with the Clerk. They are cited both by name and paragraph number and also by the pages from the Joint Appendix filed in the court of appeals.

Although local franchising authorities had previously exercised regulatory authority over cable systems, including (in many cases) the authority to regulate rates (*Rate Order* ¶ 6 [JA 239-40], the 1984 Act sought to reduce regulation in order to "benefit[] both consumers and industry participants alike." H.R. Rep. 628, 102d Cong., 2d Sess. 29 (1992) (*House Report*). *See also 1990 Report* (5 FCC Rcd 4962) ¶ 1 ("[t]he Cable Act was designed to promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems"). In particular, the 1984 Act permitted regulation of rates only for basic cable service, and only if a cable system was not subject to "effective competition."[3]

The 1984 Act broadly realized the congressional objectives of fostering growth in the cable industry and increasing benefits to subscribers. *1990 Report* ¶¶ 2-4; *Senate Report* 3. Not only did cable television become far more widely available,[4] but, with substantial increases in capital investment by cable operators ($1.7 billion per year by 1989, up 55 percent since 1984 (*1990 Report* ¶ 3)), the average channel capacity of cable systems increased from 24 in 1985 to 37 in 1991. Kagan Media Index, Jan. 22,

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[3] Applying this standard, the Commission found that the rates charged by a cable system were constrained, and that "effective competition" was present, whenever subscribers to a system had available at least three over-the-air stations--approximately 97 percent of cable systems. *See Senate Report* 4. In 1991, the FCC revised its definition of "effective competition," *1991 Effective Competition Order*, 6 FCC Rcd 4545 (1991), concluding that a cable system was subject to effective competition, *i.e.*, unable to exercise market power, if its subscribers could receive six unduplicated over-the-air television stations (or if 50% of the homes it passed were also passed by another multichannel provider that had achieved 10% penetration). *Id.* ¶ 1.

[4] The number of homes in which cable was available increased from 60.5 million to 89.4 million (more than 95% of homes) between 1984 and 1992, Kagan Media Index, June 20, 1994, at 14, and cable penetration increased from 37 percent of all television households in January 1985 to approximately 61 percent by June 1992. *House Report* 29; *see 1990 Report* ¶ 2.

1992, at 2. With this greatly increased capacity came correspondingly rapid growth in the cable programming services provided to subscribers. *Senate Report* 3 ("Programming choices have also grown about 50 percent since the 1984 Act was passed, with many more offerings now being planned"). Cable programming networks, which had spent about $340 million on their programming in 1984, spent about $1.5 billion by 1991. *House Report* 31. And licensing fees paid by cable operators to programmers increased from $165 million in 1985 to $1.5 billion in 1992. Kagan Media Index, June 20, 1994, at 14.

B. As the cable industry grew, however, concerns were raised that some cable systems might have imposed undue rate increases since deregulation. As a general matter, increases had been expected in the wake of a federal policy designed to counter years of unduly restrictive municipal regulation. *See 1990 Report* ¶ 6 (some rate adjustments had been "anticipated consequences" of deregulation). But, by the end of the 1980s, the federal government began to study the question whether, and to what extent, particular cable operators possessed market power and were exercising it to charge monopoly prices to consumers—whether because of a paucity of competing broadcast stations, the costs of building a second cable system in a franchise area, an insufficient number of non-cable multichannel providers of video programming, or other factors.[5]

In 1989, the General Accounting Office reported on its survey of cable systems' rates since deregulation. *See Senate Report* 4-6 (quoting GAO report). Based on information received from about 15 percent of the Nation's cable systems, the GAO concluded that, between 1986 and 1988, basic and non-basic tier rates had in-

[5] Multichannel video programming distributors include satellite master antenna television systems (SMATV), multichannel multipoint distribution systems (MMDS), television receive-only satellite service (TVRO), direct broadcast satellite systems (DBS), and video dialtone systems (VDT). *See* 47 C.F.R. § 76.905(d).

creased, respectively, by 29 percent and 26 percent—while, during the same period, the average number of channels provided on those tiers had increased, respectively, by 25 percent and 19 percent. *Id.* at 5. The price per channel for basic service thus had increased from 47 to 48 cents per month—a rate well below inflation. *Id.*

The following year, the FCC used the GAO survey to make an independent report to Congress about whether cable systems' rate increases were unreasonable. Lacking cost data, the FCC said that it could not reach any conclusion about whether increases in basic-service rates reflected market power. *1990 Report* ¶ 32; *id.* ¶ 34 ("we cannot conclude that the price increases reflect a pattern of anticompetitive behavior or a definitive degree of market power by the cable industry"), ¶ 13(3) ("the rise in rates alone, without cost data, is not conclusive on the question of market power"). But, taking the industry as a whole, the FCC pointed out that there was reason to question whether there had been unreasonable rate increases. *Id.* ¶ 33 ("the average price of basic cable service when measured on a per-channel basis has increased at a rate *significantly lower than inflation during the past three years*") (emphasis added). Even for the systems that had raised rates more significantly, the FCC noted that those increases might have been a "one-shot 'correction' to rates that had been constrained below reasonable levels before deregulation." *Id.* ¶ 34. Nonetheless, the FCC reported that a limited number of cable systems had increased rates "substantially more than the average" and that those "limited individual cases" were largely responsible for the perception that the cable industry as a whole wielded market power and had unduly raised rates. *Id.*

II. The 1992 Cable Act.

The House committee in 1992—whose bill, in relevant part, was substantially enacted by Congress—likewise took the view that some, but not most, cable operators had abused their deregulated status. *House Report* 29, 31 (rate increases "in some instances" had been unrea-

sonable). Specifically, the committee found "that rate increases imposed by *some cable operators* are not justified economically and that *a minority of cable operators* have abused their deregulated status" and "unreasonably raised the[ir] rates." *Id.* at 33 (emphasis added); *see id.* at 86 ("While most cable operators have been responsible about rate increases in this deregulated environment, a *minority* of cable operators have abused their deregulated status and have unreasonably raised subscribers' rates. In *some* cases brought to the attention of the Committee, those rate increases have been egregious.") (emphasis added). The committee expressed the need to "protect consumers from unreasonable behavior by the 'renegades' in the cable industry." *Id.* at 30.[6]

The 1992 Cable Act, however, made most cable systems at least potentially subject to rate regulation. Exempted from regulation were cable systems subject to "effective competition," as defined by the Act. *See* § 543(b)(2), (c)(1). Abandoning the use of broadcast television signals as a competitive yardstick, Congress delineated three categories of cable systems deemed subject to effective competition and therefore exempt from rate regulation: low-penetration systems, overbuild systems, and municipal systems.[7] The rates of those systems

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[6] *See also* 138 Cong. Rec. S14, 224 (daily ed. Sept. 21, 1992) (Sen. Inouye, sponsor) (statute contains a "bad actor provision" so that "the FCC may regulate, on a case-by-case basis, rates for tiers of programming other than basic"); 138 Cong. Rec. H8,671 (daily ed. Sept. 17, 1992) (Rep. Harris) (statute "provides a means to rein in renegade cable operators from charging excessive rates in the upper tiers of cable service"); 138 Cong. Rec. S561 (daily ed. Jan. 29, 1992) (Sen. Inouye, sponsor) ("S.12 includes what could be called a 'bad actor' provision").

[7] A low-penetration system is defined as a cable system serving fewer than 30 percent of the households in a franchise area. An overbuild system is defined as a cable system where a comparable unaffiliated multichannel service is available to at least 50 percent of the households in a franchise area and at least 15 percent of the franchise area's households subscribe to competing services. A municipal system is defined as a cable system where the franchising

may not be regulated at either the federal or local level. § 543(a).

The remainder of cable systems (the large majority) were made subject to a two-part scheme of regulation. *Compare* § 543(b) *with* § 543(c). One part applies to "basic" service, which is the tier of service that all subscribers are required to purchase and which must include all local broadcast stations and local public, educational, and government access (PEG) channels. § 543(b)(7). Local franchising authorities generally oversee the rates for basic service based on standards set by the Commission. Congress directed the Commission to promulgate standards—within a deadline of 180 days—to ensure that a system's rates for basic service were "reasonable," and it expressly stated that the goal of the regulations should be to protect consumers from "rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition." § 543(b)(1); H.R. Conf. Rep. 862, 102d Cong., 2d Sess. 62 (1992) (*Conference Report*).[8]

The statute separately regulates "cable programming service" (CPS or "non-basic" service), which consists of all other "tiers" of cable service, *i.e.*, all programming other than what is included on the basic tier (which is regulated under the scheme described above) or offered on a per channel or per program basis ("a la carte" programming, which is not regulated under the Act). Congress did not set an explicit goal for CPS rates, as it did for basic rates. Rather, it simply directed the Commission to determine "in individual cases" whether a system's non-basic rates are "unreasonable," and then mandated

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authority itself offers multichannel service to at least 50 percent of a franchise area's households. *See* § 543(*l*)(1)(A)-(C).

[8] The statute directs the FCC to consider, in addition to "the rates for cable systems, if any, that are subject to effective competition," various factors related to costs, revenues, and profits. § 543(b)(2)(C).

that the Commission consider a set of criteria quite different from those specified for basic rates. These criteria included "the rates for similarly situated cable systems offering comparable cable programming services," the history of CPS rates for that system, and the overall rates of the system, as well as the rates of systems subject to effective competition. § 543(c)(1), (2). Unlike with basic service, only the FCC, without participation by local governments, has authority to determine whether non-basic rates are excessive. § 543(c)(1).

III. Regulation of Rates by the Commission.

A. The Commission adopted its first *Rate Order* on April 1, 1993. Notwithstanding the separate statutory treatment of basic and non-basic tiers, the FCC decided at the outset that it was "preferable" to institute a regulatory framework that was "tier neutral," *i.e.*, to apply the same set of standards to basic rates and non-basic rates. *Rate Order* ¶ 396 [JA 483-84]. Accordingly, the Commission applied to both basic and non-basic tiers the standard set out in the statute to govern basic service: rates should not exceed what would be charged by a comparable system subject to effective competition.

To implement this standard, the Commission conducted a survey of the rates being charged, on September 30, 1992, by all of the systems subject to effective competition that it could identify (low-penetration, overbuild, and municipal systems) and a random sample of the systems not subject to effective competition.[9] Analyzing this data, the Commission found that, other factors being equal, systems subject to effective competition charged rates that, on average, were 9.4% lower than systems not subject to effective competition. *Id.* ¶ 14 n.29, ¶ 205 [JA 245-46,

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[9] Because most of the cable systems in the Nation are small (fewer than 5,000 subscribers), most of the systems in the Commission's sample were small. Small systems, however, serve fewer than 15% of cable subscribers in the Nation. *See* Economists Inc., *The Effect of "Competition" on Rates Differs for Large and Small Cable Systems* p. 1 (submitted to FCC, cited at *Second Reconsideration* Tech. App. 4301 n.63) [JA 1052].

368].[10] The Commission rounded up this "competitive differential" to 10% and then constructed a "benchmark" table for cable systems grouped according to the significant system characteristics. The Commission calculated the average per-channel rate for each such group and reduced that figure by 10% to approximate what would be charged by such a system if it were subject to effective competition. *Id.* ¶ 213 [JA 372].

The resulting rates established caps for basic and non-basic service offered by regulated systems. If a system had rates above the applicable benchmark, it had to reduce its rates to the benchmark or by 10%, whichever was the smaller reduction. *Id.* ¶ 218 [JA 374-75].[11] If a system's rates were either at or below its benchmark, the Commission deemed those rates to be "reasonable" ones. *Id.* ¶ 213 [JA 372]. Then, with these initial maximum rates in place, the Commission set limits, generally restricted to inflation, on the increases in price that a cable operator was to be allowed in the future. *Id.* ¶¶ 223-240 [JA 376-85].[12]

B. The implementation of the benchmark scheme—which went into effect on September 1, 1993—provoked an intense political response. Although the net effect was

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[10] Along with setting out its benchmark system, the Commission in the *Rate Order* made clear that a cable system could elect the "safety valve" of cost-of-service regulation for its rates and thereby use costs to justify rates above the benchmarks. But the Commission indicated that cost-of-service regulation should not be a primary means of regulating either the basic or CPS tier. *Rate Order* ¶ 392 [JA 479-80] ("applying cost-of-service regulation to thousands of cable systems would impose tremendous administrative burdens on regulatory authorities and cable operators").

[11] The Commission indicated that it would further study those systems whose rates were more than 10% above the benchmarks (the 10% reduction for such "outlier" systems might be viewed as a windfall for the "bad actors"). *Id.* ¶ 220 [JA 375].

[12] Shortly before the *Rate Order* was to become effective, the FCC ruled on, and largely rejected, a number of petitions for reconsideration, saying that it had disposed of "as many of the most pressing issues as possible." *See First Reconsideration* ¶ 2 [JA 759].

a rate reduction for the "typical" cable subscriber, the scheme did not produce a large across-the-board rollback for basic tier rates. Although the FCC had anticipated these effects, *see Cable Rules Will Raise Some Bills*, Wash. Post, Aug. 18, 1993, at A1, A9, members of Congress immediately put pressure on the Commission to order deeper rate cuts. On September 24, 1993, a letter from 130 members of Congress to the FCC Chairman questioned the "perverse result" of the regulations and proposed "that the FCC should adjust these regulations"; and a few days later all three Commissioners appeared before Congress. Communications Daily, Sept. 16, 1993, at 10; Sept. 27, 1993, at 8; Sept. 29, 1993, at 1. In November, 36 Senators wrote to the new Chairman "that the commission must take additional actions to reduce cable rates." *See Cable Industry Lobbies FCC, Saying Rate Cuts Would Threaten the Information Superhighway*, Wall St. J., Feb. 17, 1994, at A18; *Markey, At Odds with FCC, Plans Hearing on Cable Rates*, Boston Globe, Sept. 11, 1993, at 9 (Subcommittee Chairman "said he is confident that . . . [the new FCC Chairman] would push for new FCC regulations aimed at lowering cable rates").

The Commission then undertook a new industry survey and a thorough reconsideration of its regulations. On February 22, 1994, the Commission adopted, and on March 30 it released to the public, a new and substantially more onerous regulatory regime—the *Second Reconsideration* order. The Commission continued its tier-neutral regulation of basic and CPS rates, looking to "effective competition" as the guide to rate reductions for both services, but it made important changes, including two having dramatic effects.

First, the Commission brought *all* regulated systems under its determination that the rates of systems not subject to effective competition were excessive in the full amount of the competitive differential. In the *Rate Order*, the Commission had deemed benchmark rates reasonable, *i.e.*, reflective of rates charged by systems subject to effective competition, and so it did not require a cable system

with rates at or below the benchmarks to reduce its rates: "there is no reason to assume that its rates reflect undue market power even in the absence of effective competition." *Rate Order* ¶ 216 [JA 373-74]. Without any new evidence, however, the FCC now concluded that *all* cable systems not subject to effective competition must be charging monopoly prices (*Second Reconsideration* ¶¶ 15-16 [JA 880] ("in our view, a noncompetitive rate is not a 'reasonable' rate")), explaining that it had no "conclusive basis" to "assume" that even cable operators "whose rates, nonetheless, appear to be low (*i.e.*, at or below a benchmark)" were *not* exercising market power. *Id.* ¶ 16 [JA 880]. Even while conceding that it was largely operating in the dark (*id.* ¶ 107 [JA 917-18] ("[w]ithout more detailed information on the cost and demand conditions facing a particular cable operator, however, it is impossible to determine the amount by which that operator's revenues exceed its costs")), the Commission determined that the rates of all cable systems subject to regulation under the Act required reduction, immediately or over time.

Second, and even more strikingly, the Commission came up with a new calculation of the magnitude of the compelled rate reduction. Using the same data from the year before, the FCC revised its statistical calculation of the competitive differential and concluded that the differential was not 10% but in fact 17%. The Commission accordingly ordered all regulated cable systems to adopt a 17% rate reduction (immediately or, in certain cases, over time) to establish their initial maximum lawful rates, with future rates then constrained by limits on the increases allowed over those initial rates (based on inflation, certain "external cost" increases, and the number of channels).[13]

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[13] Cable systems generally were required either to reduce their rates immediately to 17 percent below 1992 rate levels or, if that reduction would drop rates below the new benchmarks, to reduce their rates to the benchmark but then refrain from taking inflation-

The Commission arrived at this figure in several steps. To begin with, the Commission concluded that it was free to assign different weights to the different categories of competitive systems, and to adjust the figures by "refining" its analysis of each category, based on its own perception of the "extent and nature of competition faced by each." *Id.* ¶ 91 [JA 912]. Then, following that method, the Commission decided to give no weight to the most numerous category (low-penetration systems), *see id.* ¶¶ 92-94 [JA 912-13]; *id.* ¶ 28 [JA 885], or to the dozen or so municipal systems. *Id.* ¶¶ 31, 103 [JA 886, 916]. Having narrowed its focus to the overbuild systems alone, which it said provided "the most informative data with regard to estimating reasonable rates," the Commission based its competitive differential of 12-13% on the rates charged during the *initial* stages of competition—rejecting the argument that the initial rates were actually below competitive levels (because of price wars) in favor of a theory that later rates were above competitive levels (because of collusion). Finally, for good measure, the Commission revised the differential upward to 16%, by narrowly defining the areas of actual competition, *id.* ¶¶ 29-30, 96-105, Tech. App. 4285 [JA 885-86, 913-17, 1036], and, based on its "expertise," upward again to 17%. *Id.* ¶ 105 [JA 917] ("we have selected 17% as the revised competitive differential").

The Commission acknowledged that there was no competitive differential at all for the large systems that serve more than 85% of the Nation. Nevertheless, the Commission chose not to limit its rate orders, but to apply the 17% differential to all systems, regardless of size. *Id.* ¶¶ 86-89 [JA 910-11]. The Commission again rested its action on a theory about collusion, this time suggesting that large systems subject to effective competition

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based increases until a 17% cut in real prices was effected over time. *Second Reconsideration* ¶¶ 110, 127, 131 [JA 919, 929-30, 933]. The Commission held out the possibility of some change in this regime for the latter group of systems if justified by future cost studies it promised to undertake. *Id.* ¶¶ 35, 36 [JA 888-89].

might be more effectively colluding than their smaller counterparts. *Id.*

IV. The Court of Appeals' Decision.

The court of appeals upheld the orders against a number of challenges based on the First Amendment. Although the court declined to apply strict scrutiny to the orders, Pet. App. 47a-53a, it did recognize that, as regulations aimed at the press, the orders were subject to heightened scrutiny. See Pet. App. 53a (citing *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994)). In applying that scrutiny, however, the court did not advert either to the burden imposed on the government to justify its restrictions or to the need of reviewing courts to exercise independent judgment in assessing those justifications. *See Turner*, 114 S.Ct. at 2470-71. Rather, at critical points, it deferred to assumptions made by the government, applying traditional standards of administrative review.

The opinion of Judge Randolph—ostensibly the opinion resolving First Amendment issues—first concluded that "[t]he government's interest in regulating cable rates is evident—protecting consumers from monopoly prices charged by cable operators who do not face effective competition." Pet. App. 53a. But, in rejecting arguments that the government had not shown an actual history of pervasive monopoly pricing, Judge Randolph relied almost exclusively on figures from the 1989 GAO study (*see* pages 4-5 *supra*), which showed rate increases greater than inflation on an absolute basis but smaller than inflation on a per-channel basis. Pet. App. 54a-55a. The opinion did not mention that the Commission, the year after the GAO study, had stated that, based on the data in the study, "we cannot conclude that the price increases reflect a pattern of anticompetitive behavior or a definitive degree of market power by the cable industry." *1990 Report* ¶ 34. Without requiring any further explanation by the Commission, the court nonetheless put primary weight on that same information as the basis for accepting that pervasive monopoly pricing exists.

The opinion of Judge Randolph then dismissed several arguments about the scope of regulation—in particular, that it vastly overstated the overall competitive differential by relying on data from periods of initial competition and that it applied the 17% figure to large systems despite data showing no differential at all for those systems—solely on the basis of the analysis in Judge Ginsburg's opinion. Pet. App. 56a n.12. That opinion, however, said explicitly that it was subjecting the rate orders to nothing more than the usual highly deferential review. Judge Ginsburg thus stated that, with respect to each of the points in dispute, the issue to be resolved is simply "whether the agency has " 'examine[d] the relevant data and articulated a [. . .] "rational connection between the facts found and the choice made." ' " Pet. App. 7a (quoting *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). Indeed, Judge Ginsburg went on to declare that "[b]ecause agency ratemaking is far from an exact science and involves 'policy determinations in which the agency is acknowledged to have expertise,' our review thereof is particularly deferential." Pet. App. 7a (quoting *United States v. FCC*, 707 F.2d 610, 618 (D.C.Cir. 1983)).

Judge Ginsburg then applied these traditional standards in rejecting arguments that the regulations imposed far greater restrictions on speech than the data of the Commission itself would justify. Thus, for example, the opinion recognized the fact that "the competitive differential for overbuilt systems falls over time"—to a figure far below the 12%-13% differential used by the Commission as the starting point for its mandatory reductions—but it nonetheless concluded that the decision to rely on the initial, much higher figure was not arbitrary and capricious. Pet. App. 13a-16a. In so doing, it held that the Commission could choose to impose the more sweeping cuts based on a "hypothesis" that the lessening differential "*could* be due to the emergence of 'parallel or coordinated pricing.' " Pet. App. 14a (emphasis added). It found that theory "not so implausible that reliance upon it is unreasonable . . . ." Pet. App. 15a.

Judge Ginsburg likewise acknowledged that there was no competitive differential at all with respect to systems with more than 5,000 subscribers. Yet, his opinion again concluded that, notwithstanding this fact, it was not "arbitrary and capricious" for the Commission to order large systems to reduce their rates by 17% as well. Pet. App. 17a. According to the opinion, the Commission was entitled to assume that the rates of all large systems were supracompetitive because the systems themselves had not proved that they lack market power. Pet. App. 17a. In the absence of such proof, Judge Ginsburg reasoned, the Commission could, once again, proceed to regulate on the basis of a hypothesis that collusion had raised the rates of overbuild systems above competitive levels.

REASONS FOR GRANTING THE WRIT

This case—which involves the regulation of rates for virtually all cable systems throughout the United States —presents an important, unsettled question of First Amendment law: what is the proper role of a court in reviewing the grounds asserted to justify restrictions on speech? Although this Court has said that the government bears the burden of justifying restrictions on speech, and emphasized the need for courts to make an independent review of the record said to support such restrictions, it has also, in certain contexts, admonished courts to remain deferential in their review. *See* pages 17-19 *infra*. Faced with these somewhat conflicting directives, some courts have concluded that, to sustain regulation of speech, they need to find only that the judgment of the officials imposing the regulation was "reasonable," and not that a genuine problem requiring the particular regulation in fact existed. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 115 S. Ct. 1821 (1995) (No. 94-1140). The court in this case stopped short of even that modest threshold, upholding an unprecedented regime of rate regulation largely on the basis of a determination that the asserted grounds were not "arbitrary and capricious."

The issue of what "heightened scrutiny" actually means is one of widespread importance. As a result of decisions of this Court, heightened (but not strict) scrutiny is now the standard applied to most kinds of restrictions on speech: regulation of conduct with an incidental effect on speech, regulation of the time, place and manner of speech, regulation of commercial speech, and content-neutral regulation of speech. *See* page 24 *infra*. Although each of the various tests speaks of the need for government to demonstrate a substantial interest advanced by its regulation, the boundaries of First Amendment protection ultimately will depend upon the extent to which regulators are allowed to decide for themselves on the need to restrict speech—that is, the extent to which courts will defer to their judgments. And, in this particular case, it will determine whether the government can do something that it has not done in some 200 years of constitutional history: establish sweeping limits on what members of the press may charge for their speech.

We also believe that the decision below is seriously flawed. Rather than require the Commission to establish that the vast majority of cable systems were in fact engaged in monopoly pricing, or at least to demonstrate that data contradicting that theory were in fact unreliable, the court of appeals repeatedly indicated that it was applying nothing more stringent than traditional, garden-variety standards of administrative review. Under any proper standard of "heightened" review, however, it is not enough for a court simply to find that the actions of an administrative agency are not "arbitrary and capricious" or that (as the court below said at one critical juncture) a pivotal governmental theory was "not so implausible that reliance upon it is unreasonable . . . ." Pet. App. 15a. To extend that kind of deference to the very officials imposing restrictions on speech in the first place markedly, and improperly, narrows the protections afforded to speech under the First Amendment.

I. THIS CASE PRESENTS AN IMPORTANT ISSUE REGARDING JUDICIAL REVIEW OF RESTRICTIONS ON FIRST AMENDMENT ACTIVITIES.

A. The various tests for heightened scrutiny require regulations affecting speech to serve an important governmental interest and to directly and materially advance that interest. *See, e.g., Edenfield v. Fane*, 113 S.Ct. 1792, 1798-99 (1993); *United States v. O'Brien*, 391 U.S. 367 (1968).[14] In addition, it is essential that the regulation not burden substantially more speech than necessary to promote the asserted interest. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). The Court has made clear that this standard is intended to protect speech against government overreaching: rather than allow the government to regulate freely in furtherance of any legitimate interest, it "require[s] the government goal to be substantial, and the cost to be carefully calculated." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989) (*SUNY*).

The worth of these elevated standards is considerably diminished, however, if government may largely decide for itself whether they are met. The familiar rational basis test, for example, adopts, as a starting point, a strong presumption that the government is exercising its powers lawfully: as a result, a regulation must be upheld "if there is any reasonably conceivable state of facts" to justify it. *FCC v. Beach Communications, Inc.*, 113 S.Ct. 2096, 2101 (1993). But heightened scrutiny, at least in theory, is not so lax. Given that heightened scrutiny is invoked only when the government is trenching upon areas of constitutional freedom, the standard does not, and should not, employ a wide-ranging presumption that regulations are valid. This Court has thus stated unequivocally that "the State *bears the burden of justifying*

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[14] In this petition we address only the issue of the proper standard for heightened scrutiny. With respect to the issues of strict scrutiny and agency construction of the Act itself, we rely on the petition filed by Time Warner Entertainment Co. L.P.

its restrictions." *SUNY*, 492 U.S. at 480 (emphasis added).

The "burden" assigned to the government alters the nature of constitutional scrutiny in several critical respects. To begin with, it means that the government cannot simply rely on an interest that is substantial "in the abstract." *See Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445, 2470 (1994) (plurality opinion). Instead, it is the job of government to "*demonstrate* that the recited harms are real, not merely conjectural, and that the regulation will *in fact* alleviate these harms in a direct and material way." *Id.* (emphasis added). Moreover, even if the government satisfies that initial burden, it has an additional hurdle to clear: it also must "*bear*[] *the burden of showing* that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests.' " *Id.* (quoting *Ward*, 491 U.S. at 799) (emphasis added).

Reviewing courts, for their part, are not simply left to inquire whether the government acted without any conceivable basis: rather, they must exercise "independent judgment" in deciding whether the government has actually met its burden of supporting the restrictions on speech. *See Turner*, 114 S. Ct. at 2471 (plurality opinion). Indeed, this Court has recently said that, in cases implicating First Amendment rights, courts have "*a constitutional duty* to conduct an independent examination of the record as a whole . . . ." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S.Ct. 2338, 2344 (1995) (emphasis added). Absent that duty, of course, a government imposing restrictions on speech—merely by making self-serving findings or adopting theories tilting towards regulation—would be able to confer on itself the power to infringe rights otherwise protected against government interference. The Court thus noted in *Hurley* that the obligation to exercise independent judgment "rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," observing that a court must "decide

for [itself] whether a given course of conduct falls on the near or far side of the line of constitutional protection." 115 S.Ct. at 2344.

These two basic principles—that the government bears the burden of justifying its restrictions and that reviewing courts must exercise independent judgment to see that the burden is met—would seem to leave little room for the sort of deference traditionally accorded to legislative or administrative officials. It is not surprising, therefore, that this Court has stated plainly that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).[15] But the picture, unfortunately, is not so clear. At other times, the Court appears to have said just the opposite: that courts *should* give deference to the judgments made by legislators or administrators. *See Turner*, 114 S.Ct. 2470-71 (plurality opinion); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 569 (1990). *See also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985). Thus, at least in the context of reviewing Congress' predictive judgments, the Court has stated that a reviewing court should determine only whether "Congress has drawn reasonable inferences based on substantial evidence." *Turner*, 114 S.Ct. at 2471 (plurality opinion). *See also Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341-42 (1986) (accepting "belief" of legislature as "reasonable").

The proper standard of review thus remains uncertain. Is a court to exercise truly independent judgment and decide whether the government has met its burden of showing that a problem requiring this degree of interference with speech *in fact* exists? Or is it merely to determine whether the judgments made by the government to

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[15] The Court noted, in fact, that, if deference did limit judicial inquiry, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." 435 U.S. at 844.

support its restrictions are *reasonable*? *See generally Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993) (discussing degrees of deference under different standards of review). In a case now before this Court, the First Circuit came down squarely on the side of the latter view, *44 Liquormart*, 39 F.3d at 7, declaring that the government need not convince a court that its basis for regulation in fact exists. The court thus held that the burden "is not correctness, it is reasonableness." *Id.*

We believe the standard adopted by the First Circuit leans too far in the direction of deference to government regulation, and too little in the direction of safeguarding freedom of speech. But the court of appeals in this case was, if anything, even more deferential. As we discuss in detail at pages 26-30 *infra*, the opinion of Judge Randolph, to the extent that it examined the asserted grounds for the regulations at all, simply accepted an assumption made by the Commission (that cable operators had pervasive market power) based on a study that the Commission itself, not very long before, had found inadequate to support that same assumption. Then, to make matters worse, the opinion of Judge Ginsburg—on which Judge Randolph relied to resolve the remaining First Amendment issues —expressly and unequivocally stated that it was applying nothing more than familiar standards of administrative review. Given that the subject was ratemaking, in fact, Judge Ginsburg announced that judicial review in this case would be "particularly deferential." Pet. App. 7a.

The result is that the called-for heightened scrutiny was not heightened at all. In reviewing agency regulations, of course, a court does *not* exercise independent judgment nor does it require the agency to bear the burden of convincing the court of the basis for its regulations. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29, 42-43 (1983). Rather, reviewing courts require only that an agency "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and

the choice made.'" *Id.* at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). *See also Northwest Airlines v. U.S. Dept. of Transp.*, 15 F.3d 1112 (D.C. Cir. 1994). Indeed, agency regulations carry a presumption of validity. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *Association of American Railroads v. ICC*, 978 F.2d 737 (D.C. Cir. 1992).

The court of appeals thus got matters quite backwards. To be meaningful, heightened scrutiny must require something more than a determination that the government—admittedly regulating in an area of constitutional delicacy—"might" have a valid reason for doing so. To allow the government to restrict speech on the basis of assumptions that are simply "reasonable" ultimately assigns the risk of error not to those seeking to restrict speech, but to those engaged in speech. Put another way, a standard amounting to no more than "reasonableness" embodies the view that it is better for government to *over*regulate in the area of speech than to *under*regulate. *See generally Addington v. Texas*, 441 U.S. 418 (1979) (burden of proof reflects views of society about where risk of error should fall). That notion seems flatly contrary to the most basic principles underlying the First Amendment. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (adopting constitutional standard to allow "breathing space" for First Amendment freedoms).[16]

The government cannot be expected, of course, to prove what is ultimately unprovable. But it must, at a minimum, do all that it reasonably can do to establish that a need for restrictions on speech in fact exists. After all, if the government attempted to regulate the rates of *one* cable system—on the ground that it was exercising market power and charging customers 17% more than a competitive rate—it would be obligated to provide evidence

[16] The need for close scrutiny was particularly necessary here, given that the Commission essentially revamped its regulatory scheme—imposing far deeper cuts on far more systems—in response to overt political pressure. *See* pages 9-10 *supra*.

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that the system in fact possessed market power and that systems without market power charged significantly less. Although it is often harder to prove broad propositions than narrow ones, it would nevertheless be odd to have a rule that, because the government is seeking to regulate the rates of *all* cable systems, it could meet its burden merely with assumptions deemed "plausible" or not "arbitrary and capricious." That approach would effectively subject sweeping, prophylactic rules to less scrutiny than restrictions grounded in actual misconduct. *See generally NAACP v. Button*, 371 U.S. 415, 438 (1963) ("[b]road prophylactic rules in the area of free expression are suspect").[17]

We believe, therefore, that it is not enough for the government to put forward "reasonable" grounds for regulating speech. Rather, a reviewing court, having due regard for the nature of available proof, should require that the government make out a "convincing case" for regulation. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 644 (1985). Under this standard, a court should *not* sustain regulation of speech just because it is able to find, applying customary standards of deference, that the government has satisfied ordinary standards of administrative review. If that were all that was required, it would effectively mean that the government could broadly regulate the price for speech with no more basis than it needs to regulate the price for railroad service or for natural gas.

B. The issue raised here is of importance, not just to cable systems whose rates are now controlled by the federal government, but to any speakers affected by a variety of government restrictions on speech. Here, the

[17] As we discuss, *see* pages 27-30 *infra*, the government here twice relied on assumptions about "collusion" between competing systems, even though it made no effort whatsoever to obtain available cost data that would tend either to substantiate or to disprove its theory. And it likewise acted upon an assumption of pervasive monopoly pricing without having the cost data that it had previously identified as necessary to support any such conclusion.

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relaxed standard of review allowed the court of appeals to uphold a sweeping regime of rate regulation for most of the approximately 11,000 cable systems in the country. It woud seem an elemental principle of First Amendment law that, absent actual misconduct, those engaged in creating and distributing speech are entitled to determine the price to be charged for it, *see generally Riley v. National Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781 (1988), and, in fact, no system of rate regulation singling out the press has ever before been undertaken. Yet, this vast and novel system has been deemed constitutionally acceptable largely on the basis of a mix of theories and assumptions about possible misconduct.

The potential damaging effects on speech are both significant and obvious. This Court has made clear that cable systems are "entitled to the protection of the speech and press provisions of the First Amendment." *Turner*, 114 S. Ct. at 2456. *See Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). Although Judge Randolph professed doubt about how "rules requiring cable operators to charge reasonable rates burden speech," Pet. App. 56a, that observation, like much of the rest of the decision below, simply assumes the answer to a critical question. What the government needs to prove—and, in our view, clearly has not proved—is that an order directing cable systems to cut their rates by 17% will typically result in "reasonable rates" and not, as a matter of fact, something less. This issue is not a matter of policy; it is, at bottom, a question of fact: it depends upon whether cable systems are, in fact, routinely exercising market power to charge more than competitive prices. If they are not, then the order to reduce rates is not simply cutting away excess profits, but limiting both the amount and quality of speech that the affected systems are able to provide to their subscribers.[18]

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[18] The Commission itself has recognized that overregulation of rates adversely affects speech, declaring in a subsequent order that its earlier rules had "provided inadequate incentives for systems to add channels." *Sixth Reconsideration* Tech. App. 12 (1994).

The proper standard of review is also a critical, even determinative, issue in numerous other First Amendment cases. *See, e.g., 44 Liquormart,* 39 F. 3d at 7. As we have noted, *see* page 16 *supra,* intermediate scrutiny now applies to regulation of conduct with an incidental effect on speech (*United States* v. *O'Brien*); to regulation of the time, place, and manner of speech (*Clark v. Community For Creative Non-Violence,* 468 U.S. 288 (1984)); to regulation of commercial speech (*Edenfield v. Fane*); and to content-neutral regulation of speech itself (*Turner*). If a broad range of activities involving speech is to receive appropriate protection, therefore, it is essential that heightened scrutiny mean just that: a closer testing of the grounds for government regulation than is usually given under the rational basis standard or the principles governing review of administrative orders, with the government required to establish, rather than hypothesize, the premises required to support rules affecting speech. Further review here is needed to assure that First Amendment rights will be adequately protected.[19]

II. THE DECISION BELOW APPLIES TOO LENIENT A STANDARD OF JUDICIAL REVIEW.

The court of appeals acknowledged that orders regulating cable television rates are subject to at least intermediate scrutiny under the First Amendment. Pet. App. 53a. That conclusion is plainly correct given the holding in *Turner Broadcasting* that laws "singl[ing] out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State . . . and so are always subject to at least some degree of heightened First Amendment scrutiny." 114 S. Ct. at 2458 (internal quotes and citation omitted). But, having recognized the governing standard, the court failed to recognize what that standard actually means. By extending far too much

[19] Although we believe that the issues raised in this petition merit plenary review in their own right, it may be appropriate to hold the petition pending disposition of the issues presented in *44 Liquormart,* No. 94-1140.

deference to the government, the court wrongly relieved it of the burden to establish that the assertedly important government interest is, in fact, real and not based on "speculation" or "conjecture." *Edenfield v. Fane*, 113 S. Ct. at 1798-99; *Turner*, 114 S. Ct. at 2470 (plurality opinion); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995). And the court likewise excused the government from demonstrating that the regulation, in its full breadth, is necessary to serve the claimed interests. *SUNY*, 492 U.S. at 480.

This impermissible easing of the burden can be readily seen by looking at the court of appeals' treatment of the central factual matters on which the scheme of regulation ultimately depends. At the heart of this case is a basic question: has the government justified its broad order requiring cable systems to reduce their rates on the basis of a 17 percent "competitive differential"? That figure is intended to represent the difference between actual rates and "competitive" rates, and because the regulations apply to virtually *every* cable system, the government must establish two critical facts: *first*, that virtually every cable system is charging more than competitive rates and, *second*, that the amount of the excess is approximately 17 percent. If either point is incorrect—*i.e.*, if the government is forcing systems to reduce rates *already* at a competitive level or compelling systems to bring rates *below* a competitive level—then it is doing more than simply restraining excessive profits: it is cutting away at protected speech itself.[20]

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[20] The court of appeals noted at several points that cable operators could elect to have their rates determined in "cost-of-service" proceedings, *see* Pet. App. 19a-20a, 56a, but, for good reason, it did not hold that the availability of that alternative would excuse an otherwise unconstitutional scheme. The Commission itself regards the benchmark rules as the "primary" method of regulation (FCC C.A. Br. at 67), and the court of appeals recognized that "a cost-of-service regulatory proceeding is expensive for the cable operator," so that option "will indeed remain a limited exception to the general rule." Pet. App. 22a. In any event, this Court has made clear that the government may not defend the use of "a surrogate

The problem for the government in this case is simple: *its own data* suggest that, in large part, *both* of these assumptions are wrong. With regard to whether there was pervasive monopoly pricing requiring a nationwide system of rate regulation, the available data showed that, during the period of deregulation, rates on a per-channel basis had increased *less* than the rate of inflation, indicating (as the House Committee seemed to recognize) that abuses were *not* widespread in the absence of mandatory controls. Then, on the question whether a "competitive differential" exists, data compiled by the Commission itself showed that, while systems with a direct cable competitor on average charge approximately 13 percent less than systems without such a competitor, the difference is much smaller after the initial period of competition, suggesting that (following some temporary price wars) the rates of competitive systems are not substantially lower. And, finally, the same data showed that large systems without competition from another cable operator charge *no more than* large systems with such competition, thus suggesting that other restraints on the rates of those systems are present. In light of these data, it was necessary for the court, when reviewing the Commission rules under heightened scrutiny, to do more than ask simply whether the government had a "plausible" theory to reconcile the data with its conclusions; it was obliged to exercise truly independent judgment in assessing the purported grounds for this extensive regulatory scheme.

The court, unfortunately, did not do anything of the sort. The opinion of Judge Randolph determined that the government has an important interest in "protecting consumers from monopoly prices charged by cable operators" (Pet. App. 53a)—a proposition that nobody quar-

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and imprecise formula" to restrict First Amendment rights on the ground that those affected may choose a burdensome alternative. *Riley v. National Fed'n of the Blind of N. Carolina*, 487 U.S. at 793-94 & n.8. It is thus impermissible to "requir[e] the speaker to prove 'reasonableness' case by case based upon what is at best a loose inference that the [rates] might be too high." *Id.* at 793.

rels with in the abstract—but it gave no independent examination whatever to the key question in dispute: whether a finding of pervasive monopoly pricing could be squared with the data before the Commission. Rather than assess the record as a whole, the court simply held that the Commission was entitled to rely on data in a 1989 GAO report, showing previous rate increases above the rate of inflation (though not on a per-channel basis), wholly ignoring the fact that the *Commission* had expressly found that data insufficient to support an assumption of widespread monopoly pricing. See page 5 *supra*. Even without heightened scrutiny, it would seem appropriate to explore the reasons for now relying on data previously deemed unreliable for this very purpose, but the court did not. *See State Farm*, 463 U.S. at 44 (requiring agency to explain change in position).

On the other two central questions, Judge Randolph simply relied on the discussion by Judge Ginsburg. Pet. App. 56a n.12. But it could not be clearer that Judge Ginsburg did *not* apply any sort of heightened scrutiny to these issues. To the contrary, his opinion set out the usual standard for review of administrative decisions: "whether the agency has 'examine[d] the relevant data and *articulate*[*d*] [. . .] *a "rational connection* between the facts found and the choice made.'" Pet. App. 7a (quoting *State Farm*, 463 U.S. at 43) (emphasis added)). Then, stressing that heightened scrutiny was no part of his analysis, the opinion defined an especially limited role for the court: "Because agency ratemaking is far from an exact science and involves 'policy determinations in which the agency is acknowledged to have expertise,' our review thereof *is particularly deferential.*" Pet. App. 7a (quoting *United States v. FCC*, 707 F.2d 610, 618 (D.C. Cir. 1983) (emphasis added)).

The subsequent discussion was fully in keeping with these deferential standards. With respect to the issue of rates for "overbuild" systems—almost the exclusive basis for the finding of a substantial "competitive differential"—the opinion rejected the notion that initial prices are

artificially low because of "price wars," *id.* at 13a-14a, crediting instead the "*hypothesis* that the diminution in the competitive differential over time *could* be due to the emergence of 'parallel or coordinated pricing.' " Pet. App. 14a. Judge Ginsburg proclaimed that this "hypothesis"—which the Commission itself put forward as no more than one of two "scenarios" that are "equally consistent" with the data (*Fourth Report* ¶¶ 99, 101 [JA 915]; *see also id.* Tech. App. 4301 [JA 1052] ("one possible explanation"))—"cannot be proven without additional data," Pet. App. 14a, but excused the Commission from obtaining that readily available data on the ground that a theory of ratemaking " 'is not subject to the same substantiation principle as the substantial evidence test applicable to fact finding.' " Pet. App. 14a-15a (quoting *National Ass'n of Greeting Card Publishers v. United States Postal Service*, 607 F.2d 392, 401 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980), quoting *Continental Airlines v. CAB*, 551 F.2d 1293, 1301 (D.C. Cir. 1977)). The court thus concluded that the decision to rely on this hypothesis was not "arbitrary and capricious," stating: "[t]he Commission's theory is not so implausible that reliance upon it is unreasonable, especially when one considers that there is no evidence in the record, either anecdotal or analytical, to provide empirical support for the cable companies' price war hypothesis." Pet. App. 15a.[21]

It would seem an understatement to say that, as a substitute for heightened scrutiny, this analysis is wholly inadequate. To put it plainly, neither the Commission nor

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[21] Though unnecessary to our point here, we note that there *is* evidence to support the "price war hypothesis." The House Committee in 1992 referred to evidence of "greenmail" by overbuild entrants. *House Report* 45. The FCC in 1990 had concluded that it was "not clear" whether overbuild-system rates are equilibrium rates. *1990 Report* ¶ 67, 5 FCC Rcd 4962, 5002 (1990). And the Commission in its *Second Report and Order* (¶ 131; JA 831-32) and in its *Fourth Report and Order* (¶¶ 98-99; JA 914-15) cited to comments attesting to the reality of "price wars." *See, e.g.*, NCTA Comments at 18-19 (Jan. 27, 1993); NCTA Petition for Reconsideration at 11-12 (June 21, 1993).

the court below has any real idea why the competitive differential declines over time. It might be (as the Commission says) that the later prices are artificially high; or it may be (as we say) that the initial prices are artificially low. But the answer is crucial. If the latter explanation is the correct one, then the entire basis of the 17 percent rollback is unsound: the true rates of competitive cable systems are *not* substantially lower than the rates of other cable systems, but only during a temporary period of price cutting at the inception of competition. Yet, by virtue of the highly deferential form of review, the Commission was freed from any obligation to secure the data—essentially cost data for a relatively small number of systems—that could answer the question one way or the other.

The treatment of the relevant data for large cable systems is no better. The Commission has acknowledged that, even by its own methodology, there is *no* competitive differential at all for cable systems with more than 5,000 subscribers: that is, large systems not facing effective competition (as defined in the Act) charge no more than large systems that do face effective competition. But, in the face of that data, the Commission has nevertheless insisted that large cable systems reduce their rates by the standard 17 percent, and the court of appeals, again utilizing the wrong standard, held that its action was not "arbitrary and capricious." Pet. App. 17a.

The decision by the court below (per Judge Ginsburg) rested on two grounds, both of them insufficient under the proper First Amendment standard. First, it concluded that *the cable systems* had not offered a convincing explanation for what the data on their face showed: that large cable systems either do not have, or do not exercise, market power in their communities. Pet. App. 17a. This analysis again gets matters turned around: heightened scrutiny, properly applied, requires *the government* to demonstrate the existence of a genuine problem justifying the regulation at issue. *See Turner*, 114 S. Ct. at 2470 (plurality opinion). Second, the court noted that

the Commission, faced with the evidence showing no competitive differential for large systems, had conducted additional analyses and "[t]he results lent no support to the cable companies' contention that large systems without the constraint imposed by 'effective competition' charge rates nearer to the competitive level than do small systems." Pet. App. 18a.[22] All that means, however, is that the Commission *does not know*, one way or the other, whether large systems are charging more than competitive rates: it has data showing that they do not and analysis suggesting that they may. That state of ignorance cannot justify a sweeping order that could sharply affect the speech to be provided by those cable systems serving most viewers throughout the Nation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[22] There are in fact good reasons to expect larger cable systems to have greater incentives to keep prices lower: they are in larger markets with more competition for viewers' time and dollars for information and entertainment; and they offer a wider array of remunerative services (*e.g.*, enhanced, premium, pay-per-view, home shopping) that depend vitally on levels of subscription, encouraging operators to increase subscriptions by lower pricing.

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Nos. 95-774 and 95-775

In the Supreme Court of the United States

OCTOBER TERM, 1995

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
PETITIONER
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
PETITIONER
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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27 pp

QUESTION PRESENTED

Whether the court of appeals properly applied intermediate scrutiny in rejecting the cable industry's challenge to the FCC's implementation of Section 3 of the 1992 Cable Act, which requires regulation of the rates of cable operators that do not face effective competition.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-99a) is reported at 56 F.3d 151.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1995. A petition for rehearing was denied on August 17, 1995. Pet. App. 102a. The petitions for a writ of certiorari were filed on November 15, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Only about 50 of the more than 11,000 cable systems in this country face competition from another cable operator. As the court of appeals explained, "[t]he monopolies most cable operators now enjoy resulted from exclusive franchises granted by local authorities." Pet. App. 51a. See also *id.* at 52a ("Exclusive franchising ended in 1992 * * *, but the effects linger on.").

Like other monopolies that depend on the use of public rights-of-way, the cable industry, "[a]lmost from its inception in the 1950s, * * * has been subject to some form of rate regulation." Pet. App. 41a. Initially, rate regulation generally was administered by municipalities and other local franchising authorities "as a means to prevent cable operators from charging unreasonably high rates." H.R. Rep. No. 934, 98th Cong., 2d Sess. 24 (1984). In 1984, Congress enacted the Cable Communications Policy Act, Pub. L. No. 98-549, 98 Stat. 2779 (1984 Cable Act), to "establish a national policy concerning cable communications." 47 U.S.C. 521(1). With respect to rate regulation, the 1984 Cable Act restricted the authority of local governments by permitting them to regulate only the basic service rates of those cable systems that were not subject to "effective competition" as defined by the FCC. See S. Rep. No. 92, 102d Cong., 1st Sess. 4 (1991) (*1991 Senate Report*); H.R. Rep. No. 628, 102d Cong., 2d Sess. 30 (1992) (*1992 House Report*). The FCC's definition of "effective competition," as implemented in 1986, effectively prohibited local authorities from regulating the rates of cable systems in approximately 96% of the nation's

communities. *1992 House Report* 31; see also *1991 Senate Report* 4.

Experience under the 1984 Cable Act's deregulatory regime led Congress to enact the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992 Cable Act). Contrary to Congress's expectation in 1984, competition to cable had not developed from satellite systems. *1992 House Report* 26. Consequently, Congress in 1992 found that "most cable television subscribers have no opportunity to select between competing cable systems" and that "[t]he result is undue market power for the cable operator as compared to that of consumers." 1992 Cable Act, § 2(a)(2) and (4), 106 Stat. 1460. The legislative record of the 1992 Cable Act contained substantial evidence that the cable industry, which had become the "dominant nationwide video medium" (*id.* § 2(a)(3), 106 Stat. 1460), was taking unfair advantage of its status as an unregulated monopoly. Specifically, Congress found that the average monthly cable rate had increased "almost 3 times as much as the Consumer Price Index since rate deregulation" (*id.* § 2(a)(1), 106 Stat. 1460); see also *1991 Senate Report* 4-8, and that consumers in some locations were being "gouged by cable operators" (*id.* at 7).

Congress concluded that rate reregulation was necessary to ensure that cable operators would not exercise "undue market power vis-a-vis video programmers and consumers." 1992 Cable Act, § 2(b)(5), 106 Stat. 1463; see also *1991 Senate Report* 8-9, 20. Accordingly, Congress enacted the 1992 Cable Act, which expanded the scope of cable rate regulation by redefining "effective competition." 47 U.S.C. 543(*l*)(1) (Supp. V 1993). Under the new statutory

definition, a cable system faces "effective competition"—and is therefore exempt from rate regulation—only if it falls within one of three categories: (1) "low penetration systems," whose subscribers number less than 30% of the households in a franchise area (47 U.S.C. 543(*l*)(1)(A) (Supp. V 1993)); (2) "overbuilds," which face actual head-to-head competition from another video programming service (47 U.S.C. 543(*l*)(1)(B) (Supp. V 1993)); and (3) "municipal systems," which are operated by municipalities or by private operators that compete with municipally operated systems (47 U.S.C. 543(*l*)(1)(C) (Supp. V 1993)).

Any cable system that does not face "effective competition" as defined by the 1992 Cable Act is subject to rate regulation. Under the statutory scheme, the FCC promulgates regulations pursuant to which local franchising authorities regulate the rates for the basic service tier. 47 U.S.C. 543(a) and (b) (Supp. V 1993).[1] The statute requires that the Commission "shall, by regulation, ensure that the rates for the basic service tier are reasonable." 47 U.S.C. 543(b)(1) (Supp. V 1993). The 1992 Cable Act also directs the Commission to establish a system of

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[1] At a minimum, the basic tier must include local commercial television stations; noncommercial educational television stations; public, educational, and governmental access programming required by the cable system's franchise; and television broadcast station signals provided by the cable system to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area. 47 U.S.C. 543(b)(7)(A) (Supp. V 1993). In addition, the statute permits cable operators to add other video programming signals or services to the basic tier. 47 U.S.C. 543(b)(7)(B) (Supp. V 1993).

exclusive FCC regulation of the rates of upper tiers, which are called "cable programming services." 47 U.S.C. 543(c) (Supp. V 1993).[2] The Commission's regulations must "establish * * * criteria * * * for identifying, in individual cases, rates for cable programming services that are unreasonable." 47 U.S.C. 543(c)(1)(A) (Supp. V 1993). In determining whether basic tier rates are "reasonable" and whether upper tier rates are "unreasonable," the Commission is directed to consider seven factors for basic tier rates and six similar factors for upper tier rates. 47 U.S.C. 543(b)(2)(C), 543(c)(2) (Supp. V 1993). Both sets of factors direct the Commission to consider "the rates for cable systems * * * that are subject to effective competition." 47 U.S.C. 543(b)(2)(C)(i), 543(c)(2)(B) (Supp. V 1993).

2. The Commission developed a "tier neutral" rate regulation system, under which "the same methodologies and standards are used to establish allowable rates for both the basic service tier and the cable programming service tier(s)." Pet. App. 29a-30a. Before developing that system, the Commission conducted a survey of the rates and system characteristics of more than 400 cable systems, including almost all systems that face head-to-head competition

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[2] The statute defines "cable programming service" to include "any video programming provided over a cable system * * * other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis." 47 U.S.C. 543(*l*)(2) (Supp. V 1993). Video programming that is offered on a per channel or per program basis—including pay-per-view channels and premium channels such as HBO and Showtime—is exempt from rate regulation. See 47 U.S.C. 543(a)(1), 543(*l*)(2) (Supp. V 1993).

from another cable operator. The Commission then performed an econometric analysis of the survey data, comparing systems that were and were not subject to "effective competition" as defined by the 1992 Cable Act. See *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631, 5761 (¶ 199) (1993) (*Rate Order*). The Commission's initial analysis of the survey results revealed that three system characteristics, in addition to the presence or absence of competition, explained variation in rates: the number of channels offered by the system; the number of subscribers; and the number of satellite-delivered signals offered. *Rate Order*, 8 FCC Rcd at 5768, 6144 (¶ 210, Appendix E at ¶ 27). Controlling for the effects of those three variables, the Commission found a "competitive differential" of 10% between the systems that faced "effective competition" (within the meaning of the 1992 Cable Act) and those that did not. *Rate Order*, 8 FCC Rcd at 6145, 6146 (Appendix E at ¶¶ 29, 31). As the court of appeals explained, however, the majority of the systems in the sample that faced "effective competition" as defined by the Act were "low penetration" systems—that is, systems that did not actually face head-to-head competition but that were relieved from rate regulation under the statute because they served fewer than 30% of the households in their franchise area. Pet. App. 9a. The survey showed that the rates charged by low penetration systems are only 1% lower than the rates charged by similar systems that do not face "effective competition." *Ibid.* In contrast, the rates charged by overbuilds were found to be 13% lower, and the rates

charged by municipal systems 37% lower, than the rates charged by similar systems that do not face "effective competition." *Ibid.*

On reconsideration, the FCC refined its econometric analysis of the survey data in order to reflect more accurately the difference between the rates charged by noncompetitive systems and "reasonable" rates. *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*Second Reconsideration*). Specifically, "in a further multiple regression analysis, the FCC isolated and controlled for certain additional factors that affect a system's rates." Pet. App. 9a. "More significant[ly], however," the Commission disaggregated the data—that is, conducted separate analyses of low penetration systems, overbuilds, and municipal systems—and "decided that the overbuild sample provides the best indicator of the effects of competition upon rates." *Ibid.* As noted above, the Commission's analysis indicated a competitive differential of 13% between overbuilds and cable systems that did not face "effective competition." *Ibid.*

The Commission then made two adjustments to the 13% figure. First, only a few of the systems in the overbuild sample competed head-to-head across their entire franchise areas; not surprisingly, the FCC's analysis concluded that rates decreased as the extent of the competition increased. The Commission therefore "adjusted the overbuild figure from 13 percent to 16 percent * * * by factoring in the percentage of each system in that group that is actually overbuilt by a competing system." Pet. App. 9a. Second, since

very few systems face competition from more than one cable operator, the 16% figure actually represents the difference in price between a monopolist and a duopolist. Based partly on the fact that a duopoly situation is far from ideal, and partly on consideration of other factors (including the 37% differential observed for municipal systems), the Commission adjusted the 16% figure to 17%. *Id.* at 16a. The 17% competitive differential represents the Commission's best estimate of the average difference between the rates charged by most cable operators and the "reasonable" rates mandated by the statute.

The Commission did not necessarily require cable operators to reduce their rates to reflect the 17% differential. Instead, "a cable system can avoid the automatic (now 17 percent) reduction by opting for cost-of-service regulation." Pet. App. 10a. That is, any cable operator may elect to participate in a proceeding of the sort commonly used to set rates for other monopolists that use public rights-of-way, such as telephone companies and other utilities. Under that approach, a cable operator may set its rates to cover its costs of providing cable service together with an 11.25% return on its investment. See *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking*, 9 FCC Rcd 4527, 4612 (¶ 147) (1994) (*1994 Report and Order*).

After establishing the system for setting initial cable rates at a reasonable level, the Commission adopted a system of "price cap" regulation to ensure that rates would remain reasonable in the future. See *Rate Order*, 8 FCC Rcd at 5774, 5776-5777 (¶¶ 223, 227-229); *Second Reconsideration*, 9 FCC Rcd at

4200-4201 (¶ 169). Under the price cap system, cable rates may increase or decrease according to a formula that accounts for the annual percentage change in the cost of goods and services in the economy as a whole, as measured by the Gross National Product Price Index (GNP-PI), and for the change in specified "external costs" that are generally outside the cable operator's control and are not otherwise accounted for in the GNP-PI adjustment. *Rate Order*, 8 FCC Rcd at 5782-5790 (¶¶ 239-254). One "external cost" that a cable operator may recover (even though it is within the cable operator's control) is the cost of adding channels. To promote the growth and diversity of cable programming, FCC rules permit cable operators to pass on to their subscribers the actual expense of adding channels to their systems, along with an overhead charge and a 7.5% mark-up for each channel added. *Second Reconsideration*, 9 FCC Rcd at 4242-4245 (¶¶ 245-249).[3]

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[3] The Commission subsequently revised its rules to provide additional incentives for cable operators to add new channels. See *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, 10 FCC Rcd 1226 (1994) (*Sixth Reconsideration*). Under the revised rules, operators may increase rates by a fixed amount per month per channel as an alternative to the 7.5% mark-up. *Id.* at 1244-1260 (¶¶ 54-98). In addition, operators may create "new product tiers" for which they can charge any rate as long as existing service is not fundamentally changed and subscribers affirmatively request a new tier. *Id.* at 1233-1239 (¶¶ 16-37). Petitioner Time Warner Entertainment (TWE) claims (Pet. 18 n.32) that the Commission "candidly admitted that it had originally gotten it wrong" when it made those adjustments to its price cap rules. In fact, the Commission neither made nor

3. Petitioners sought review of the FCC's cable rate regulations. In an opinion written by Judge Ginsburg, the court first rejected petitioners' claims under the Administrative Procedure Act (APA). With respect to the Commission's most important decision—to focus on the overbuild systems rather than the low penetration systems—the court (1) held that the Commission had "articulated a powerful economic rationale for according only minimal weight" to the low penetration data, and (2) further concluded that the decision to focus on the overbuilds, on the theory that they "provide the most accurate data for the purpose of simulating competitive cable rates," is "a proposition that seems at first glance to be nearly self-evident." Pet. App. 12a, 13a. The court found "completely reasonable" the adjustment from 13% to 16% based on the evidence showing that price competition intensifies based on the extent of the competition. *Id.* at 15a. The court of appeals also upheld the further 1% upward adjustment to a 17% competitive differential, recognizing that that adjustment was supported both by the Commission's theory that duopolists do not compete as vigorously as firms in a fully competitive market and by the data regarding municipal systems, which showed a 37% competitive differential. *Id.* at 16a.

The court of appeals also rejected petitioners' argument that a separate competitive differential should be calculated for large systems. The court explained that the Commission had reasonably decided that it

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makes any such admission. The court of appeals correctly approved both the initial rules, which authorized the 7.5% mark-up, and the additional options later provided to cable operators. See Pet. App. 50a & n.8.

would be "statistically risky" to "subdivid[e] the already small sample of systems facing effective competition into still-smaller sub-samples." Pet. App. 17a-18a. It also recognized that a partial FCC analysis had failed to support petitioners' theory that large cable systems are generally unable to exercise market power because they are typically located in areas that have more entertainment alternatives. *Id.* at 17a (noting that the Commission's analysis "takes much of the wind out of the cable petitioners' sails").[4]

In rejecting the cable operators' other primary challenge—their contention that the Commission had erred by developing a tier neutral approach—the court of appeals began by noting that the cable industry's argument was "premised upon a significant misunderstanding of the Act." Pet. App. 30a. First, contrary to the cable operators' contention, "Congress was concerned with what it perceived to be the excessiveness of cable rates in general, not the rates for a particular type of service." *Ibid.* In addition, the court found no merit to the cable operators' argument, based on the statutory requirement that basic rates be "reasonable" while cable

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[4] Petitioner National Cable Television Association (NCTA) states (Pet. 12) that "[t]he Commission acknowledged that there was no competitive differential at all for the large systems." The Commission made and makes no such acknowledgement. The Commission merely acknowledged that, if the data were sliced in a statistically improper manner, the differential could be rendered statistically insignificant for some sub-groups. See Gov't C.A. Br. 92-97. Moreover, the statistical analysis of the cable industry's own experts showed a 20% differential—that is, a differential larger than that selected by the Commission—for the largest cable operators, those with more than 50,000 subscribers. Charles River Associates, *An Analysis of the FCC's Cable Television Benchmark Rates* 33 (June 17, 1993).

programming service rates must not be "unreasonable," that "the Commission's regulation of cable programming service must be more lenient than its regulation of the basic service tier." *Id.* at 32a. The court found that argument "at the least counter-intuitive" and stated that the difference in terminology "is easily explained as a product of the different procedural postures" in which challenges to basic tier rates and cable programming service tier rates arise. *Ibid.* With respect to the statutory directive that the Commission "consider" various factors in establishing reasonable rates, the court concluded that the FCC "met those requirements and exceeded them." *Id.* at 35a.

Petitioners also contended that the FCC's rate regulations violated the First Amendment rights of cable operators. In an opinion written by Judge Randolph, the court of appeals rejected petitioners' constitutional claim. Pet. App. 40a-57a. As an initial matter, the court ruled that the regulations were not subject to strict scrutiny. *Id.* at 47a-53a. The court noted that "[o]ne frequently-mentioned reason for imposing the more demanding First Amendment standard petitioners advocate is that the law is content-based," and concluded that "[n]o serious claim can be made that the cable rate regulations are of this sort." *Id.* at 48a.

The court of appeals reviewed the cable rate rules under the intermediate standard that this Court applied in *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445 (1994), and concluded that the cable rate rules satisfy the two-part intermediate scrutiny test. First, the court found that the government's interest in "protecting consumers from monopoly prices charged by cable operators who do not face

effective competition" is "important or substantial." Pet. App. 53a. Second, the court determined that the Commission's rules for ensuring reasonable cable rates do not "burden substantially more speech than is necessary." *Id.* at 55a-56a (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989)). In that regard, the court emphasized that "rate regulation is triggered by the absence of effective competition and ceases when effective competition emerges." Pet. App. 56a.

In rejecting petitioners' First Amendment challenge to the methodology used by the Commission in implementing the rate regulation provisions of the 1992 Cable Act, Judge Randolph's opinion for the court incorporated by reference Judge Ginsburg's opinion rejecting petitioners' APA challenge. Judge Randolph stated:

> In the opinion for the court written by Judge Ginsburg, we explain in detail why the Commission's treatment of the data for low penetration and large systems was neither arbitrary and capricious nor in violation of the 1992 Cable Act. For the reasons discussed there, we also conclude here that the Commission's treatment of those data does not raise any First Amendment concerns. Because regulated large systems and low penetration systems may, as the FCC reasonably concluded, have significant market power and therefore charge supracompetitive rates, and because the Commission established the cost-of-service option as a protective safety-valve for individual systems, there was no mismatch between the problem and the Commission's solution.

Pet. App. 55a n.10.

ARGUMENT

The court of appeals correctly held that the Commission's cable rate regulations are subject to review under intermediate rather than strict scrutiny, and it correctly sustained those regulations against petitioners' constitutional challenge. Further review is not warranted.

1. Contrary to petitioner TWE's assertion (Pet. 12-20), the court of appeals' decision to apply intermediate scrutiny to the FCC's cable rate regulations is fully supported by governing precedent. As this Court noted in *Turner Broadcasting*, strict scrutiny under the First Amendment is reserved for "regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." 114 S. Ct. at 2459. "In contrast," the Court declared, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny * * * because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Ibid.* (citing *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

The Court in *Turner Broadcasting* held strict scrutiny inapplicable to the FCC's must-carry rules, which require cable operators "to devote a portion of their channels"—about one-third—"to the transmission of local broadcast television stations." 114 S. Ct. at 2451. The Court acknowledged that the must-carry rules "interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations." *Id.* at 2460. Despite the effect of the must-carry rules on content, the Court found those rules content-

neutral—and therefore subject to intermediate scrutiny—because they did "not require or prohibit the carriage of particular ideas or points of view." *Id.* at 2462.

In light of *Turner Broadcasting*, the court of appeals correctly applied intermediate scrutiny to the FCC's cable rate regulations. Those regulations, like the must-carry rules at issue in *Turner Broadcasting*, do not "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed" or otherwise threaten "to 'distort the market for ideas.'" *Turner Broadcasting*, 114 S. Ct. at 2459, 2468 (quoting *Leathers* v. *Medlock*, 499 U.S. 439, 448 (1991)). The cable rate regulations merely require cable operators to charge reasonable rates. In addition, FCC rules permit cable operators to make a cost-of-service showing instead of reducing their rates by the competitive differential (*Rate Order*, 8 FCC Rcd at 5797-5800 (¶¶ 270-272)), to recover the expense of adding new channels plus a 7.5% mark-up (*Second Reconsideration*, 9 FCC Rcd at 4242, 4244 (¶¶ 245, 248)), and to create "new product tiers" for which they may charge any rate (*Sixth Reconsideration*, 10 FCC Rcd at 1233-1239 (¶¶ 16-37)). Those provisions serve to minimize whatever effect rate regulation may have on content.

As in *Turner Broadcasting*, moreover, strict scrutiny is not warranted because the regulations at issue are "justified by some special characteristic" of the cable industry. *Turner Broadcasting*, 114 S. Ct. at 2468 (quoting *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983)). As the court of appeals correctly found (Pet. App. 51a-52a), cable rate regulation is justified by the monopoly status that most cable operators

have attained as a result of exclusive franchises granted by local authorities. In addition, monopolists in the cable industry (unlike newspapers) exercise "bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home." *Id.* at 52a (quoting *Turner Broadcasting*, 114 S. Ct. at 2466). Responding to that distinctive characteristic of the cable industry, Congress enacted the cable rate provisions for reasons unrelated to the content of speech: It acted to prevent price-gouging by monopolists.

Thus, as the court of appeals explained (Pet. App. 49a-50a), this case is plainly distinguishable from *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 789 (1988), where this Court applied "exacting First Amendment scrutiny" to a state statute that limited the fees that professional fundraisers could charge for the solicitation of charitable contributions. The Court observed that the "desired and intended effect" of the statute was "to encourage some forms of solicitation and discourage others." *Id.* at 789 n.5. In contrast to the state law challenged in *Riley*, the FCC's cable rate rules are content-neutral, and are therefore properly reviewed under intermediate scrutiny.[5]

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[5] *Riley* is distinguishable in other respects as well. The rate regulation at issue in *Riley* was not supported by any showing that professional fundraisers in North Carolina exercised monopoly power, much less that they had been enabled to do so by the prior actions of governmental bodies. Fees that exceeded a specified percentage of the fundraiser's gross receipts were treated as presumptively unreasonable despite the Court's "clear holding" in a previous case that "there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent." 487 U.S.

2. Notwithstanding petitioners' claims to the contrary (TWE Pet. 20-30; NCTA Pet. 17-30), there is nothing exceptional about the manner in which the court of appeals applied intermediate scrutiny to the cable rate regulations. Under the two-part test reiterated by this Court in *Turner Broadcasting*, a challenged regulation must advance "an important or substantial governmental interest," 114 S. Ct. at 2469 (quoting *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)), and the means chosen must not "'burden substantially more speech than is necessary to further the government's legitimate interests," 114 S. Ct. at 2469 (quoting *Ward*, 491 U.S. at 799). In other words, a regulation satisfies intermediate scrutiny if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States* v. *Albertini*, 472 U.S. 675, 689 (1985).

The court of appeals clearly articulated that two-part test at the outset of its constitutional analysis. Pet. App. 53a.[6] The court then applied the test to the

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at 793. Finally, the standards for rebutting the presumption were ill-defined. *Id.* at 793-794. Here, by contrast, the Commission explained in detail its basis for establishing the presumptive "reasonable rate," and its methodology was determined by the court of appeals to be reasonable. Moreover, the procedure for avoiding the presumption in an individual case is closely analogous to the procedures traditionally employed for determining the permissible rates to be charged by other monopolists that use public rights-of-way.

[6] Petitioners are incorrect in their contention that the court of appeals (per Judge Randolph) misapplied intermediate scrutiny in incorporating by reference (see Pet. App. 55a n.10) Judge Ginsburg's discussion of their APA claim. Judge Randolph's opinion for the court accurately stated this Court's intermediate scrutiny standard, see *id.* at 53a, and the court

challenged regulations. First, the court of appeals found that the government has a substantial interest in "protecting consumers from monopoly prices charged by cable operators who do not face effective competition." *Ibid.* That interest clearly provides a legitimate basis for cable rate regulation. Cf. *Turner Broadcasting*, 114 S. Ct. at 2470 ("the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment"). See also *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *Associated Press* v. *United States*, 326 U.S. 1 (1945).

The court of appeals then concluded that the cable rate regulations do not "burden substantially more speech than is necessary." Pet. App. 55a-56a (quoting

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made clear its recognition "that rational basis cannot be the test," *id.* at 47a. Petitioners are surely correct in arguing that not every agency action that would survive APA review can be sustained under intermediate scrutiny. Petitioners do not contend, however, that the government's interest in protecting consumers from the exercise of monopoly power is insufficiently substantial to satisfy intermediate scrutiny; and they appear to concede (at least for purposes of this case, see TWE Pet. 14 n.20) that the establishment of reasonable rates, measured by reference to rates charged by similar cable operators in competitive markets, is a constitutionally permissible method of furthering that interest. Their sole quarrel is with the economic analysis employed by the Commission in making that comparison. With respect to the Commission's resolution of subsidiary economic questions, the court of appeals properly accorded deference to the expert agency's findings, see pages 19-21, *infra*; and Judge Randolph properly relied on Judge Ginsburg's discussion regarding the reasonableness of those findings.

Ward, 491 U.S. at 799). The court correctly found that "the rate regulations are narrow enough" because "rate regulation is triggered by the absence of effective competition and ceases when effective competition emerges." Pet. App. 56a. As the court of appeals further noted, the Commission is taking affirmative steps to limit the duration of cable rate regulation by promoting the development of competitive alternative video services through telephone-company wires. *Ibid.*[7]

The court of appeals also pointed out that the cable rate regulations provide a "safety valve"—a cost-of-service option—for any cable operator that believes it would be justified in charging rates higher than those permitted through application of the competitive differential. Pet. App. 56a-57a. The availability of that option ensures that every cable operator will be able to recover its reasonable costs and earn an 11.25% rate of return on investment. See *1994 Report and Order*, 9 FCC Rcd at 4612 (¶ 147). Taking all of those factors into account, the court correctly found that the FCC's rules do not burden substantially more speech than is necessary to achieve the congressional objective of ensuring that cable rates are reasonable.

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[7] Petitioner NCTA relies (Pet. 26) on the fact that, "during the period of deregulation, rates on a per-channel basis had increased *less* than the rate of inflation" as evidence that cable operators have refrained from exercising their market power. But, as the court of appeals explained (Pet. App. 54a-55a), "per-channel figures are misleading because, * * * [a]s a cable operator adds more channels (most did in the 1980s), the operator's fixed costs are spread over additional channels and its per-channel fixed costs decline."

Contrary to petitioners' contention, the court of appeals did not err in according deference to the economic analysis used by the Commission in setting "reasonable rates" pursuant to its statutory mandate. As *Turner Broadcasting* makes clear, a reviewing court's "obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with [the court's] own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." 114 S. Ct. at 2471 (opinion of Kennedy, J.); see also *id.* at 2473-2475 (Stevens, J., concurring in part and concurring in the judgment). The fact that First Amendment issues are implicated therefore does not mean that a reviewing court must resolve *de novo* all empirical questions bearing on the ultimate disposition of a constitutional claim.[8]

Similar concerns for institutional competence mandate judicial deference to technical judgments made by an expert agency pursuant to a clear

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[8] Indeed, even when applying strict scrutiny, this Court has not required the government to demonstrate that the precise line between lawful and unlawful conduct is the best (much less the only reasonable) one that could be drawn. See *Burson* v. *Freeman*, 504 U.S. 191, 210 (1992) (opinion of Blackmun, J.) (argument that 100-foot campaign-free zone around polling places should be reduced to 25 feet "is a difference only in degree, not a less restrictive alternative in kind," that does not raise a question of "constitutional dimension"); *Buckley* v. *Valeo*, 424 U.S. 1, 30 (1976) (per curiam) (if a reviewing court "is satisfied that some limit on [campaign] contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000").

statutory delegation of authority. As noted above (see note 6, *supra*), petitioners do not contest the substantiality of the governmental interest involved. Nor do they challenge the Commission's constitutional authority to establish "reasonable rates" for cable service, measured by reference to rates charged in competitive markets. Their argument instead is that the Commission failed to prove in the court of appeals that its economic analysis was correct. Petitioners' effort to constitutionalize the economic regulation of the communications industry is without merit. Because the task of establishing reasonable cable rates has been assigned by Congress to the FCC, and because a reviewing court possesses neither the expertise nor the resources to duplicate the Commission's performance of that task, the court of appeals' constitutional analysis properly reflected deference to the agency's economic determinations.

Petitioners' attack on the Commission's rate-setting methodology is particularly unavailing in light of the availability of the cost-of-service alternative. Consistent with the First Amendment, Congress might have required all cable operators that do not face "effective competition" (like other monopolists using public rights-of-way) to participate in cost-of-service proceedings to establish permissible rates. Congress instead directed the FCC to devise an alternative rate-setting methodology so as to reduce the burden upon both the Commission and the regulated entities that cost-of-service proceedings would entail. Indeed, the FCC was extremely successful in developing a streamlined alternative, since only about 6% of all cable operators opted for a cost-of-service showing. Gov't C.A. Br. 72. Petitioners' constitutional challenge to the Commission's deter-

minations underlying the development of that streamlined alternative is therefore without merit.[9]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1996

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[9] Petitioner NCTA suggests that this case is similar to *44 Liquormart, Inc.* v. *Rhode Island*, 39 F.3d 5 (1st Cir. 1994), cert. granted, 115 S. Ct. 1821 (1995) (No. 94-1140) (argued Nov. 1, 1995). In that case, however, the Court granted certiorari for the limited purpose of deciding "[w]hether Rhode Island may, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages." 115 S. Ct. at 1821. Unlike the state law at issue in *44 Liquormart*, the Commission's cable rate regulations are not content-based and are not designed to restrict any speech. Accordingly, contrary to NCTA's suggestion (Pet. 24 n.19), there is no reason to hold this case pending the Court's decision in *44 Liquormart*.

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Nos. 95-774 and 95-775

In the Supreme Court of the United States

OCTOBER TERM, 1995

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS IN OPPOSITION

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7 pp

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SUPPLEMENTAL BRIEF FOR THE RESPONDENTS IN OPPOSITION

These petitions for a writ of certiorari challenge the validity of the Federal Communications Commission's current regulations governing rates for cable television. On February 1, 1996, two weeks after the

government filed its brief in opposition, Congress passed the Telecommunications Act of 1996. The President signed the bill into law on February 8, 1996. See Pub. L. No. 104-104 (1996).

Section 301 of the Telecommunications Act contains two significant provisions concerning the regulation of cable rates. Section 301(b) provides that rate regulation shall no longer apply to cable programming services provided after March 31, 1999. Section 301(c) provides for immediate deregulation of cable programming service rates and some basic tier rates charged by a small cable operator in any franchise area in which that operator services 50,000 or fewer subscribers.* The Act defines a "small cable operator" as a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entities whose gross annual revenues in the aggregate exceed $250,000,000.

By sharply curtailing the extent to which the FCC will continue to regulate cable rates, the Telecommunications Act diminishes the importance of petitioners' challenge to the Commission's current cable rate regulations. For that reason, and for the reasons previously discussed in our brief in opposition, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FEBRUARY 1996

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* Section 301(b) and (c) is included as an appendix to this brief.

APPENDIX

TITLE III—CABLE SERVICES

SEC. 301. CABLE ACT REFORM.

* * * * *

(b) RATE DEREGULATION.—

(1) UPPER TIER REGULATION.—Section 623(c) (47 U.S.C. 543(c)) is amended—

(A) in paragraph (1)(B), by striking "subscriber, franchising authority, or other relevant State or local government entity" and inserting "franchising authority (in accordance with paragraph (3))";

(B) in paragraph (1)(C), by striking "such complaint" and inserting "the first complaint filed with the franchising authority under paragraph (3)"; and

(C) by striking paragraph (3) and inserting the following:

"**(3) REVIEW OF RATE CHANGES.**—The Commission shall review any complaint submitted by a franchising authority after the date of enactment of the Telecommunications Act of 1996 concerning an increase in rates for cable programming services and issue a final order within 90 days after it receives such a complaint, unless the parties agree to extend the period for such review. A franchising authority may not file a complaint under this paragraph unless, within 90 days after such increase becomes effective it receives subscriber complaints.

"(4) SUNSET OF UPPER TIER RATE REGULATION.—This subsection shall not apply to cable programming services provided after March 31, 1999.".

(2) SUNSET OF UNIFORM RATE STRUCTURE IN MARKETS WITH EFFECTIVE COMPETITION.—Section 623(d) (47 U.S.C. 543(d)) is amended by adding at the end thereof the following: "This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.".

(3) EFFECTIVE COMPETITION.—Section 623(l)(1) (47 U.S.C. 543(l)(1)) is amended—

(A) by striking "or" at the end of subparagraph (B);

(B) by striking the period at the end of subparagraph (C) and inserting "; or"; and

(C) by adding at the end the following:

"(D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area."

(c) GREATER DEREGULATION FOR SMALLER CABLE COMPANIES.—Section 623 (47 U.S.C. 543) is amended by adding at the end thereof the following:

"(m) SPECIAL RULES FOR SMALL COMPANIES.—

"(1) IN GENERAL.—Subsections (a), (b), and (c) do not apply to a small cable operator with respect to—

"(A) cable programming services, or

"(B) a basic service tier that was the only service tier subject to regulation as of December 31, 1994,

in any franchise area in which that operator services 50,000 or fewer subscribers.

"(2) DEFINITION OF SMALL CABLE OPERATOR.—For purposes of this subsection, the term 'small cable operator' means a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated

with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.".

* * * * *

Supreme Court, U.S.
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No. 95-775

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The question presented in this case is straightforward: "whether a court applying heightened scrutiny to restrictions on speech . . . must defer to factual determinations and assumptions made by an administrative agency so long as they are not 'arbitrary and capricious.' " Pet. i. In its response the government provides an equally straightforward answer: yes, it must. According to the government, "heightened scrutiny" applies to part, but only part, of regulations imposed on the press. In its view, a reviewing court properly gives heightened scrutiny to whether the asserted government interest is substantial *in the abstract* and, apparently, to whether the regulation *on its face* employs improper means. But, on the crucial subsidiary questions—*i.e.*, those necessary to determine whether the government interest is genuine *in fact* and whether the regulation *in fact* depresses more speech than

necessary to serve it—intermediate scrutiny ends, to be replaced by the usual highly deferential inquiry into whether the regulation is "arbitrary and capricious." From that point on, it appears, review of regulations imposed on the press is to be no more stringent than review of economic regulations imposed on any other industry.

This novel bifurcation of the intermediate scrutiny test, in and of itself, raises questions of considerable importance. Moreover, it seems wholly out-of-step with a number of recent cases from this Court. Those cases have stated plainly that the government bears the burden of showing that its asserted interest is in fact genuine and substantial (not just in the abstract) and further that its regulation does not in fact burden more speech than necessary. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2470 (1994) (plurality opinion); *Edenfield v. Fane*, 113 S. Ct. 1792, 1798-99 (1993); *Ibanez v. Florida Dept. of Bus. & Prof. Regulation*, 114 S. Ct. 2084, 2089 (1994). By contrast, the theory now advanced by respondents would allow the government far too much leeway to justify regulation merely by rote invocation of substantial interests (*e.g.*, preventing abuse of "monopoly power"), without assuming the more significant burden of showing that targeted regulation of activities involving speech is actually motivated by something more than political disfavor.

Proper application of heightened scrutiny is all the more important here, given that this entire, extraordinary scheme of rate regulation rests upon a single, unproven theory: that the initial rates of competing cable systems—used as a benchmark to justify the forced reduction of rates for *all* systems—are a reliable indicator of competitive rates, while later (higher) rates of those same systems are not. Thus, while there is good reason to think that initial rates are artificially low, the government instead chose to assume (without an iota of actual proof) that later rates are artificially high, relying on a theory of possible collusion that is nothing more than sheer

guesswork. Even Judge Ginsburg, applying his "particularly deferential" approach (Pet. App. 7a), could say nothing more flattering about this hypothesis than that it was "not so implausible that reliance upon it is unreasonable" (Pet. App. 15a)—the faintest of faint praise. Indeed, to defer to that ungrounded speculation is even more inappropriate in light of the fact that, after the initial rate order was issued, members of Congress had put strong pressure on the Commission to cut cable rates even more, and the Commission responded by reinterpreting the same data to justify cuts of an additional seven percent. *See* Pet. 9-13.

1. The position taken by the government—most of which is buried in a footnote (Br. in Opp. 17-18 n.6)—is that a court, applying heightened scrutiny to restrictions on speech, passes in and out of heightened scrutiny according to the nature of the issue before it. In particular, the government argues that, in addressing what it calls "subsidiary economic questions" (*id.*), reviewing courts must "accord[] deference to the expert agency's findings," further contending that the court below (per Judge Ginsburg) had to accept those findings so long as they were not arbitrary and capricious. But this theory suffers from a critical flaw: it largely reads out of the applicable First Amendment test the requirement that the government "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *See Turner*, 114 S. Ct. at 2470 (plurality opinion); *Edenfield*, 113 S. Ct. at 1798-99. And, by the same token, it largely relieves the government of "the burden of showing that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Turner*, 114 S. Ct. at 2470 (plurality opinion) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Yet it is those requirements, taken together, that protect freedom of speech (and freedom of the press) from regulations that, while justified

in theory, turn out to be unnecessary in fact to advance any genuine governmental interest.

This Court has thus emphasized that, in cases implicating First Amendment rights, courts have "a constitutional duty to conduct an independent examination of the record as a whole . . . ." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338, 2344 (1995). The reason, as the Court has noted, is simple: "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Id.* Those facts—and the grounds for crediting or discrediting them—in the end determine "whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Id.* Rather than broadly deferring to the government on factual issues, therefore, this Court has repeatedly taken a hard look at the grounds advanced to support restrictions on speech. *See, e.g., Edenfield*, 113 S. Ct. at 1800-04; *Ibanez*, 114 S. Ct. at 2089-92; *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1590-94 (1995). *See also United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1015-18 (1995).[1]

It is precisely this judicial exercise of "independent judgment" that distinguishes heightened scrutiny from garden-variety review of government action. Although the government repeatedly argues that judges must give deference to legislative and administrative judgments, we think that this blanket insistence misses an important point: that the proper level of deference varies inversely with the level of judicial scrutiny to be applied. In the

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[1] The idea that the government will assert a hollow interest is hardly fanciful. For example, although the government for years has claimed that the must-carry law was needed to forestall a threat to the economic viability of local broadcasting (citing a finding by Congress to that effect), it now concedes—having been put to its proof—that no such threat actually exists. *See* Gov't Motion to Affirm, *Turner Broadcasting System, Inc. v. FCC*, No. 95-992, at 19.

equal protection context—where, like the First Amendment context, there are different levels of review—courts typically give highly deferential scrutiny to the factual basis for classifications subject to the rational basis test, whereas review of the grounds for more suspect classifications is properly less deferential (*see, e.g., Craig v. Boren*, 429 U.S. 190, 199-204 (1976)), or hardly deferential at all (*see, e.g., Miller v. Johnson*, 115 S. Ct. 2475, 2491 (1995)). The "arbitrary and capricious" standard, of course, is the standard routinely applied to agency actions implicating no significant constitutional concerns and incorporates within itself a strong presumption in favor of the correctness of agency decision-making. It thus reflects a degree of deference that is out of place in review of actions subject to more heightened scrutiny.

The importance of applying the proper standard can be readily seen in this case. The wide-ranging scheme of rate regulation rests upon an assumption—avoidable only by electing to undergo an expensive "cost-of-service" proceeding (*see* pages 9-10 *infra*)—that any cable system not facing direct competition by a second cable system is charging 17% more than a competitive rate. The *entire basis* for this assumption, however, is data showing that the initial rates of direct competitors are 16% lower than rates of systems without direct competitors. After that initial period, even the government concedes that the rates of competing systems are only slightly lower than the rates of other systems, but the government disregards that latter figure entirely on the ground that it "might" be the result of collusion. As we have noted, Judge Ginsburg found that theory to be a sufficient basis for regulation, because (in his view) it "is not so implausible that reliance upon it is unreasonable, especially when one considers that there is no evidence in the record, either anecdotal or analytical, to provide empirical support for the cable companies' price war hypothesis." Pet. App. 15a.

It is hard to imagine a much shakier foundation for regulation of this scope. To begin with, there is really no need to rely on conjecture at all: only about 30 communities have head-to-head competing cable systems, making it entirely possible for the government (without unreasonable effort) to make further inquiries to test its theory. The government has made no effort, however, to determine whether its hypothesis is correct or not. Furthermore, even at the theoretical level, it is well-accepted that competitors in any industry, during an initial period of competition, may elect to compete on the basis of prices that are not sustainable over the long run. If that is happening in the cable industry—as there is good reason to suspect (*see* Pet. 28 n.21)—then the guiding premise of the rate regulation scheme (*i.e.*, that the initial rates of competing systems are stable competitive rates) is wrong. Yet, at the critical point of its analysis, the government was content simply to rely on its unproven conjecture—that the declining differential is the result of collusion—without even bothering to explain why that theory is more likely to be correct than the opposite theory (*i.e.*, that the long-term rates represent true competitive rates after an initial period of unsustainable price-cutting).

Even if this hypothesis is "not implausible," therefore, one thing remains clear: the government has no idea whatsoever whether it actually holds true. In fact, the government has no evidence at all to demonstrate that any of the competitive systems has ever engaged in collusion or other anticompetitive conduct. But assumptions without evidence are precisely what this Court has repeatedly found inadequate to sustain regulation of speech. *See* cases cited at page 4 *supra*. The same principle should apply here.[2]

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[2] As we discuss in the petition, the government relied on similar assumptions in explaining away other data inconsistent with its sweeping rate order. *See* Pet. 26-30.

2. Although the government suggests that review of "economic analysis" is beyond the competence of the courts, Br. in Opp. 20-21, there are several problems with this suggestion. As far as this case is concerned, the obvious point is that, with respect to the central dispute over rates of competitive systems, there is no "analysis" to defer to. Faced with data supporting its regulation (the level of initial rates) and data undercutting its regulation (the level of long-term rates), the Commission simply opted for a theory (collusion) that justified more severe cuts. Furthermore, and more generally, there is nothing about "economic analysis" that makes it categorically impervious to serious judicial review. The Court commonly deals with economic issues far more complicated than any presented here. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2591-98 (1993); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 460-86 (1992).

The suggestion of institutional incompetence may be nothing more than an indirect way of saying that economic regulation of the press—even regulation singling out part of the press—should not be subject to heightened scrutiny in the first place. After all, that is the position taken by the government two Terms ago in *Turner Broadcasting*. But the Court rejected that position, and correctly so. "Economic" regulation of the press raises constitutional concerns that are absent in regulation of other industries not involved in providing speech to the public.

Those concerns take several forms. First of all, there is the prospect (raised by the law at issue here) that government regulation will adversely affect the quality or quantity of speech itself. It is entirely possible, for example, that regulation by the government will take the form of controlling the price of a particular commodity even at the risk of lessening its quality. As a general rule, that choice causes no constitutional problems, but

that is not the case if the "commodity" is speech. While members of the press have no immunity from the antitrust laws, they should nonetheless have the right (within the bounds of generally-applicable laws) to choose how much speech to offer and what quality it should be. The fact that the government might prefer to have less speech (or less high-quality speech) in order to reduce prices to consumers is not, by itself, a sufficient reason to interfere with freedom of the press.

There is also cause for concern that government, by targeting some speech businesses for regulation, will necessarily make them dependent on government favor, thereby giving government officials greater control over the content of speech. Those links may be explicit (*e.g.*, the government will not regulate rates if the industry voluntarily increases or decreases the amount of certain programming) or implicit (*e.g.*, the government is less likely to regulate rates if the industry has gained favor by increasing or decreasing the amount of certain programming). Either way, however, the power of government to subject speech businesses to regulation not faced by other businesses threatens to erode the traditional—and highly important—separation between government and the press.

We believe, therefore, that "economic regulation" of the press is rightly subject to heightened scrutiny and that this scrutiny, to be meaningful, must apply at each stage of the analysis, not just at the initial stage of determining whether the government has asserted substantial interests in the abstract. Despite government efforts to suggest otherwise, however, this tougher scrutiny need not be the equivalent of *de novo* review. As noted previously, *see* page 4 *supra*, we believe that deference to administrative judgments moves along a sliding scale, decreasing as the extent of judicial review becomes stricter, and as the burden of justification assigned to the government becomes greater. Given that continuum, it is simply misguided to insist, as the government does, that judicial

deference to economic analysis must be the same in all contexts: that is, regardless of whether that analysis, if poorly grounded, diminishes the quality of speech or the quality of railroad service. As this Court has indicated in establishing a standard of heightened scrutiny, proper protection of the marketplace for speech requires something more.[8]

3. The government defends its general benchmark scheme as necessary to avoid a burdensome cost-of-service regime, which Congress itself plainly saw as too costly and time-consuming. In the next breath, however, the government tries to rely on the availability of this same cost-of-service regime as a solution for any imperfections in its benchmark efforts. But this Court has already held that a government may not excuse imposition of "a surrogate and imprecise formula" on the charges of businesses engaged in speech on the ground that those businesses can resort to a burdensome alternative. *Riley v. National Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 793-94 & n.8 (1988). As the Court remarked, it is impermissible to "requir[e] the speaker to prove 'reasonableness' case by case based upon what is at best a loose inference that the [charges] might be too high." *Id.* at 793. The same reasoning applies here: the government cannot build a flawed "competitive rate" out of speculations and assumptions and then require cable systems either to abide by it or to submit to long, expensive cost-of-service proceedings to show that their rates are not unreasonable.

The government also appears to make the unwarranted assumption that it could subject all cable systems to cost-

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[8] This issue, in one form or another, is before the Court in *44 Liquormart, Inc. v. Rhode Island*, No. 94-1140, and the telephone-cable cross-ownership cases (*United States v. Chesapeake and Potomac Telephone Company of Virginia*, No. 94-1893; *National Cable Television Association, Inc. v. Bell Atlantic Corp.*, No. 94-1900), cases in which businesses have challenged the grounds for limitations on their ability to speak.

of-service regulation without raising constitutional problems. But the prospect of government officials reviewing the books of businesses engaged in speech—much less dictating what costs will be allowed or disallowed—surely raises questions of adequate justification against the historical background of an institutionally independent press. Even assuming that this sort of regime might be tolerable under certain circumstances, it would have to rest, at a minimum, upon a convincing showing by the government that there was pervasive, industry-wide abuse of monopoly power. The lack of any such showing, however, is the central problem with the benchmark scheme. Thus, whatever type of regulation the government seeks to impose on the rates of cable systems, it must come forward with more than assumptions and hypotheses to explain away contradictory data. The court below did not require it to do so, and its judgment should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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